

Uniform Discipline Can Reduce Employer Litigation Costs

By former Associate Jack Blum

Employers frequently face employment discrimination claims brought by employees who were terminated for perfectly legitimate reasons having nothing to do with the employee's race or other protected characteristics. In one sense, these types of cases are a cost of doing business and can be dealt with by early settlement or dismissal by the court on a motion to dismiss or for summary judgment before a trial is even scheduled. In a recent case, however, an employer that appeared to have a strong case is now forced to face the substantial costs and risks of trial because the employer had not disciplined its employees in a uniform fashion. **The lesson to employers is that dispensing different disciplinary actions for employees who have committed the same workplace violations can provide a straw for a disgruntled employee or ex-employee to grasp onto as evidence of discrimination, increasing the employer's litigation risk and settlement costs.**

In *Wheeler v. Georgetown University Hospital*, the hospital employer appeared to have an ironclad basis for terminating one of its nurse employees. Specifically, the nurse had allegedly made major errors in her treatment of four patients within the span of a single twelve-hour shift. The nurse was reported to have, among other things, failed to give prescribed medication to a patient; given a patient the wrong medication; failed to undertake and report vital sign tests; and neglected to check in on a patient who could not move, thereby allowing the patient to become soaked in her own secretions. After receiving a report of these many mistakes and conducting an investigation, the employer terminated the nurse's employment.

At first glance, the employer should have had a strong case to obtain summary judgment on the ground that the undisputed facts showed that the employee was terminated for the non-discriminatory reason of her treatment errors, not because of her race. Summary judgment allows an employer to avoid going to a jury trial by showing that the facts of the case are undisputed and that the employer is legally entitled to judgment.

While the employer initially obtained summary judgment and avoided trial, the U.S. Court of Appeals for the District of Columbia Circuit reversed the grant of summary judgment and ruled that the employee's claims should go before a jury. The reason for the reversal was that the employee had identified five white nurses who had committed similar errors in treating patients but had received lesser discipline and kept their jobs. Employees often seek to use such evidence to show that the non-discriminatory reason relied upon by the employer was a pretext for discrimination. The court rejected the employer's argument that the nurse's past performance deficiencies justified her different treatment because the employer had not identified prior performance issues when it terminated the nurse.

Employers can certainly prevail at trial and before juries; however, trial preparation is costly and juries present tremendous uncertainty and risk. In addition, an employee's settlement demand will only increase if the employee's case is permitted to go to trial.

Employers can deny employees the "life-line" available to the *Wheeler* nurse by implementing a consistent and uniform approach to employee discipline. Employees who have similar positions and commit similar offenses should typically be treated similarly. If some other legitimate factor – such as a prior disciplinary record, poor work performance, or aggravating features of the employee's offense – justifies treating an employee differently than comparable co-workers, that factor should be included in a contemporaneous memo to the employee's personnel file. Failing to mention differentiating factors in real time can weaken an employer's case by showing that the employer is shifting its explanation – which can be evidence of pretext – by relying on those factors during litigation. By implementing a consistent and methodical approach to discipline, employers can increase their chances of disposing of discrimination lawsuits before trial through summary judgment or a favorable settlement.

review and advice of an attorney.